

CNY Plantations Sdn Bhd v Tunggak Makmur Sdn Bhd

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HIGH COURT (KOTA KINABALU) — ORIGINATING MOTION NO
BKI-25-6/5 OF 2012
CHEW SOO HO J
28 FEBRUARY 2013

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Land Law — Caveats — Removal of — Jurisdiction — Whether the Deputy Director of Lands and Surveys ('DDLS') may hear an application for removal of caveat — Assistant Collector of Land Revenue ('ACLR') failing to act upon application for removal of caveat — Whether DDLS may take over removal application from ACLR — Whether DDLS may issue notice to caveator for withdrawal — Land Ordinance (Sabah Cap 68) ss 41(1) & 116(4) — Rules of the High Court 1980 O 55 r 13 — Land Rules 1930 r 19

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Words and Phrases — 'Director' — Meaning of — Land Ordinance (Sabah Cap 68) s 4

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The appellant had caused to be registered a caveat ('the first caveat') against the respondent's land. The respondent then applied to the Assistant Collector of Land Revenue ('ACLR') to remove the first caveat. No decision or ruling was made by the ACLR even after the first caveat expired. The appellant then registered another caveat against the respondent's said land ('the second caveat'). The respondent again submitted a removal application to the ACLR but there was no response from the ACLR. Fearing that the second removal application would suffer the same fate as the earlier removal application, the respondent applied to transfer the removal application from the ACLR to the Deputy Director of Lands and Surveys ('DDLS'). The DDLS agreed with the caveatee's application and proceeded to fix a date to hear why the caveat should not be removed. Pursuant to s 41(1) of the Land Ordinance (Sabah Cap 68) ('the Land Ordinance') read together with O 55 r 13 of the Rules of the High Court 1980, the appellant sought an order that the decision given by the DDLS be set aside. The appellant contended that the DDLS had no jurisdiction to receive the respondent's removal application, to issue the notice to caveator for withdrawal of caveat ('the said notice') and to hear the parties of the said notice.

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Held, dismissing the appeal with costs of RM6,000:

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- (1) The calling for the removal application from the ACLR and scheduling it for hearing to be disposed of by the director was pursuant to r 19 of the Land Rules 1930 ('r 19'). The words in r 19 are plain and unambiguous

- A that the director is vested with the power 'at any stage' to order the transfer of any application and may himself dispose of such application or to hold enquiry on it. By the definition of 'Director' under s 4 of the Land Ordinance, the DDLS undoubtedly had that power under r 19 (see paras 6–7).
- B (2) Rule 19 and s 41(1) of the Land Ordinance do not conflict but are consistent and harmonious with one another in that if the order or decision originated from the director in the exercise of his power under r 19, an appeal can be taken to the court under s 41(1). Consequently, the
- C appellant's contention that r 19 is ultra vires s 41(1) was devoid of merit and must be rejected (see para 9).
- D (3) When the director is empowered to order the transfer of any application to be disposed of or enquired by himself, impliedly, he has the power to issue and serve a notice under s 116(4). Section 116(4) is not a mandatory provision when it states that 'the collector may serve a notice upon the caveator'. Hence any breach thereof, if any, will not vitiate the issuance and/or the service of the notice (see para 10).
- E (4) There was nothing wrong for the director/deputy director to call up the application and deal with it when the subordinate had failed to act or to perform his duty and function. The DDLS had performed his duty and function in accordance with the law and it would be mala fide to insinuate that he was bias in doing so when he was in fact performing his duty and function legally (see para 11).
- F (5) The alleged decision of the DDLS appealed against only related to the fixing of a date for the hearing of the respondent's application to remove the caveat. Fixing a date for hearing does not connote a final order which dispose of the right of the parties. It was purely procedural or an administrative process. An 'order' or 'decision' under s 41(1) must
- G necessarily refer to a decision or order which disposes of the right of the party in that particular matter already heard before the director/deputy director. This appeal was vividly premature and not maintainable on this ground too (see para 13).

H **[Bahasa Malaysia summary]**

Perayu telah memasukkan kaveat yang telah menjadi kaveat berdaftar ('kaveat pertama') ke atas tanah responden. Responden kemudiannya memohon kepada Penolong Pemungut Hasil Tanah ('PPHT') untuk mengeluarkan kaveat pertama. Tiada keputusan atau perintah telah dibuat oleh PPHT walaupun selepas kaveat pertama tamat tempoh. Perayu kemudian mendaftarkan kaveat lain ke atas tanah responden ('kaveat kedua'). Responden sekali lagi memasukkan permohonan pemotongan untuk PPHT, tetapi tiada ada jawapan dari PPHT. Bimbang permohonan pemotongan kedua akan mengalami nasib yang sama seperti permohonan pemotongan yang terdahulu,

responden memohon untuk memindahkan permohonan penyingkiran dari PPHT kepada Timbalan Pengarah Tanah dan Ukur ('DDLS'). DDLS bersetuju dengan permohonan pemohon kaveat dan meneruskan untuk menetapkan tarikh bagi mendengar mengapa kaveat itu tidak patut dikeluarkan. Menurut s 41(1) Ordinan Tanah (Sabah Cap 68) ('Ordinan Tanah') dibaca bersama dengan A 55 k 13 Kaedah-Kaedah Mahkamah Tinggi 1980, perayu meminta suatu perintah bahawa keputusan yang diberikan oleh DDLS diketepikan. Perayu berhujah bahawa DDLS tidak mempunyai bidang kuasa untuk menerima permohonan pemotongan oleh responden, untuk mengeluarkan notis untuk pengkaveat untuk pemotongan kaveat ('notis tersebut') dan mendengar pihak-pihak notis tersebut.

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Diputuskan, menolak rayuan dengan kos:

- (1) Pemanggilan untuk permohonan pemotongan daripada PPHT dan penjadualannya untuk pendengaran yang akan diputuskan oleh pengarah adalah menurut k 19 Kaedah-Kaedah Tanah 1930 ('k 19'). Kata-kata dalam k 19 adalah biasa dan tidak samar bahawa pengarah mempunyai kuasa 'at any stage' untuk memerintahkan pemindahan mana-mana permohonan dan secara sendiri boleh melupuskan permohonan itu atau untuk mengadakan siasatan ke atasnya. Berdasarkan definisi 'Pengarah' di bawah s 4 Ordinan Tanah, semestinya DDLS mempunyai kuasa di bawah k 19 (lihat perenggan 6–7).
- (2) Kaedah 19 dan s 41(1) Ordinan Tanah tidak bercanggah tetapi konsisten dan harmoni dengan satu sama lain dan oleh itu jika perintah atau keputusan yang berasal daripada pengarah dalam menjalankan kuasanya di bawah k 19, rayuan boleh dibawa ke mahkamah di bawah s 41 (1). Oleh yang demikian, hujahan perayu k 19 adalah ultra vires s 41(1) tidak mempunyai merit dan perlu ditolak (lihat perenggan 9).
- (3) Apabila pengarah diberi kuasa untuk memerintahkan pemindahan mana-mana permohonan yang hendak diputuskan atau bertanya sendiri, secara tersirat, dia mempunyai kuasa untuk mengeluarkan dan menyampaikan notis di bawah s 116 (4). Seksyen 116(4) bukanlah suatu peruntukan mandatori apabila ia menyatakan bahawa pemungut boleh menyampaikan suatu notis kepada pengkaveat. Oleh itu sebarang kemungkinan, jika ada, tidak akan melemahkan pengeluaran dan/atau penyampaian notis itu (lihat perenggan 10).
- (4) Tiada kesalahan untuk pengarah/timbalan pengarah memanggil permohonan dan menanganinya apabila pegawai bawahannya gagal untuk bertindak atau untuk melaksanakan tugas dan fungsinya. DDLS telah melakukan tugas dan fungsinya mengikut undang-undang dan ia akan menjadi mala fide untuk mengatakan bahawa dia berat sebelah dalam berbuat demikian apabila dia sebenarnya melaksanakan tugas dan fungsinya menurut undang-undang (lihat perenggan 11).

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- A (5) Keputusan yang didakwa yang dirayu di hadapan DDLS hanya berkaitan dengan penetapan tarikh bagi pendengaran permohonan responden untuk mengeluarkan kaveat. Penetapan tarikh untuk pendengaran tidak menunjukkan perintah muktamad yang menggugurkan hak pihak-pihak. Ia adalah hanyalah prosedur atau proses pentadbiran semata-mata. Suatu 'order' atau 'ruling' di bawah s 41 (1) semestinya merujuk kepada keputusan atau perintah yang menggugurkan hak sesuatu pihak dalam perkara tertentu yang telah didengar di hadapan pengarah/timbangan pengarah. Atas alasan ini juga, rayuan tersebut adalah jelas pra-matang dan tidak boleh dipertahankan (lihat perenggan 13).]
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Notes

For cases on removal of caveats, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2579–2585.

D Cases referred to

Bozson v Altrincham Urban District Council [1903] 1 KB 547, CA (refd)

Legislation referred to

- E Rules of the High Court 1980 O 55 r 13
Land Rules 1930 r 19
Sabah Land Ordinance (Cap 68) ss 4, 41(1), 46(a), 116(4)

Chau Shin Yee (Sugumar & Co) for the plaintiff.

- F *Nooraihan Mohd Ali (Yap Chin & Tiu) for the defendant.*

Chew Soo Ho J:**BRIEF FACTS OF CASE**

- G [1] By way of notice of motion dated 11 May 2012 pursuant to s 41(1) of the Sabah Land Ordinance (Cap 68) read together with O 55 r 13 of the Rules of High Court 1980, the appellant, CNY Plantations Sdn Bhd seeks an order of court that:
- H (a) the decision given by the Deputy Director of Lands and Surveys on 14 April 2012 be set aside; and
- I (b) the costs of the appeal be paid by the respondent, Tunggak Makmur Sdn Bhd, to the appellant.
- [2] The grounds of the appeal are basically that:
- (a) the learned Deputy Director of Lands and Surveys has no jurisdiction to receive the respondent's application to remove the appellant's caveat

lodged against CL No 115395625 vide Memorial No MC 1105110123 dated 24 May 2011 ('the appellant's caveat');

- (b) the learned Deputy Director of Lands and Surveys has no jurisdiction to issue the notice to caveator for withdrawal of caveat dated 8 November 2011 ('the said notice'), to hear the parties of the said notice, to make any order or to give any decision on the said Notice pursuant to s 116(4) of the Sabah Land Ordinance (Cap 68) as to do so would be ultra vires s 116(4) of the Land Ordinance and would amount to a misdirection of law on the part of the learned deputy director and to issue the said notice nor does he have the jurisdiction to hear and determine the said notice or any jurisdiction to make any order or decision pursuant to s 116(4) in relation to the said notice as any order or decision given by the learned deputy director would be rendered null and void as being ultra vires s 116(4);
- (c) r 19 of the Land Rules 1930 has no application to any application under s 116(4) of the Sabah Land Ordinance (Cap 68) and it has no application to any statutory appeal under s 41(1) of the Land Ordinance and to construe it otherwise would be ultra vires s 46(a) of the Sabah Land Ordinance;
- (d) that assuming the learned Deputy Director of Lands and Surveys is entitled to invoke r 19 of the Land Rules 1930, the said notice and any purported hearing and determination of the said notice is ultra vires and in breach of the rule of natural justice as the learned deputy director has completely failed to comply with the statutory conditions precedent set out in r 19 in contravention thereof; and
- (e) that there was a real danger of bias or a real likelihood of bias on the part of the learned Deputy Director of Lands and Surveys if he proceeded to hear and determine the said notice.

[3] The respondent opposed the appeal on the following grounds:

- (a) That on or around the 7 July 2008, the appellant had caused to be registered a caveat under Memorial No 30343809(09) ('the first caveat') against the respondent's land held under CL No 115395625 ('the respondent's land');
- (b) the respondent then on 23 April 2010 applied to the Assistant Collector of Land Revenue ('ACLR') to remove the first caveat. This application was fixed for hearing before the ACLR on 9 June 2010;
- (c) that no decision or ruling was made by the ACLR even after the first caveat expired on 6 July 2011;
- (d) that on or around 24 May 2011, the appellant registered another caveat against the respondent's said land ('the second caveat');

- A (e) the respondent then on or around 18 August 2011, submitted the respondent's removal application to the said ACLR. There was no response from the ACLR as to the respondent's application;
- B (f) fearing that the respondent's removal application would suffer the same fate as the removal application to remove the first caveat, the respondent applied to transfer the removal application from the said ACLR to the director;
- C (g) the respondent also argued that the duties and powers of the director under the Land Ordinance and the Land Rules are in fact delegated to and exercised by the deputy director and that the deputy director in charge of applications such as the r 19 application is Mr Lee Chun Kiong. Thus at all material time the said Mr Lee Chun Kiong was sitting and exercising the powers of the director. The fact that his official position is stated under his name does not alter the fact that he was sitting as director;
- D (h) there was also no requirement under the Sabah Land Ordinance for the respondent to serve the r 19 application on the appellant prior to the hearing;
- E (i) that there is no real bias or even real danger or likelihood of bias on the part of Mr Lee Chun Kiong in hearing and determining the said notice.

F [4] On 14 April 2012 the Deputy Director of Lands and Surveys ruled that he agreed with the applicant's/caveatee's application and proceeded to fix a date on 14 June 2012 to hear why the caveat should not be removed. The appellant now appeals against the decision of the learned deputy director made on the 14 April 2012.

G DECISION OF THE COURT

Jurisdiction

H [5] Section 4 of the Sabah Land Ordinance (Cap 68), provides that the definition of 'Director' means the Director of Lands and Surveys or the Deputy Director of Lands and Surveys Mr Lee Chun Kiong, a Deputy Director of Lands and Surveys must thus be construed as the director within the meaning and definition of director under s 4 and would have jurisdiction over matters within the Sabah Land Ordinance where the power is vested in the director.

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[6] The calling for the removal application of caveat from the ACLR and scheduling it for hearing to be disposed of by the director is pursuant to r 19 of the Land Rules 1930 which states:

19 On the application of a Collector or of any of the parties and after hearing such of them as desire to be heard, or of his own motion without such notice, the Director may at any stage order the transfer of any application or enquiry to any Collector for disposal or *may dispose of such application or enquiry himself*. (Emphasis added.)

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[7] The words in r 19 are plain and unambiguous that the director is vested with the power 'at any stage' to order the transfer of any application and may himself dispose of such application or to hold enquiry on it. By the definition of 'Director' under s 4 of the Sabah Land Ordinance above, Mr Lee Chun Kiong being the Deputy Director of Lands and Surveys is undoubtedly having that power under r 19.

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Whether r 19 of the Land Rules 1930 is ultra vires s 41(1) Sabah Land Ordinance (Cap 68)

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[8] Section 41(1) Sabah Land Ordinance provides:

41(1) An appeal shall lie from an order or decision of a Collector, Surveyor or Registrar given under this Ordinance to the Director, and again from any *order or decision of the Director, whether original or an appeal, to the Court*. (Emphasis added.)

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[9] I do not find r 19 to be in whatever way inconsistent with or contradictory to s 41(1) to render the former ultra vires. It is clear from s 41(1) that this appeal provision does not confine to an order or decision of the collector, surveyor or registrar which shall be appealed to the director whose decision upon that appeal can henceforth be appealed to the court but also covers any order or decision of the director which is 'original' or originated from the director himself. Reading both r 19 and s 41(1) together, I find that they do not conflict but are consistent and harmonious with one another in that if the order or decision originated from the director in the exercise of his power under r 19, an appeal can be taken to the court under s 41(1). Consequently, appellant's contention that r 19 is ultra vires s 41(1) is devoid of merit and must be rejected.

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[10] On the provision under s 116(4) of the Sabah Land Ordinance (Cap 68) relating to the service of the notice upon the caveator requiring him to show cause, I find that when the director is empowered to order the transfer of any application to be disposed of or enquired by himself, impliedly, he has the power to issue and serve a notice under s 116(4). Section 116(4) is not a mandatory provision when it states that 'the collector may serve a notice upon the caveator'. Hence any breach thereof, if any, will not vitiate the issuance

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A and/or the service of the notice.

Biasness or danger of biasness

B [11] Insinuation and imputation had been cast on the Deputy Director Mr
C Lee Chun Kiong by the appellant in submission that Mr Lee Chun Kiong
could probably have some connection with the respondent by the action taken
by him which I find to be unsubstantiated by any facts or evidence but on
self-created and unfounded suspicion or surmises which I find no merit to
countenance. The fact is clear that the ACLR had been sitting on the
Application without taking any action to decide whether the caveat lodged by
the appellant on the respondent's land ought to be removed or remained. This
was so even after the effective duration of the first caveat had lapsed when a
second caveat was lodged. I do not find anything wrong for the director/deputy
D director to call up the application and deal with it when the subordinate had
failed to act or to perform his duty and function. I further find that the calling
for the case by the director/deputy director is permissible particularly so when
the law provides them with the power to do so. Mr Lee Chun Kiong has
performed his duty and function in accordance with the law and it would be
E mala fide to insinuate that he is bias in doing so when he was in fact performing
his duty and function legally. Having called up the application, he had fixed a
date for the hearing of the parties as to why the second caveat should not be
removed. He had not indicated that the appellant would not be permitted to be
F heard.

G [12] On the fact that the correspondence had been addressed to the director
for the attention of the Deputy Director Mr Lee Chun Kiong, I find this by
itself cannot be construed as any biasness of Mr Lee Chun Kiong or that there
is danger of him being bias such proposition and contention by the appellant
without basis and unsubstantiated is preposterous and ought to be struck down
outright.

H [13] It can also be seen that the alleged decision of the said deputy director
appealed against only relates to the fixing of a date for the hearing of the
respondent's application to remove the caveat. Fixing a date for hearing
undoubtedly does not connote a final order which dispose of the right of the
parties (see *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 (CA)).
It is purely procedural or an administrative process. An 'order' or 'decision'
I under s 41(1) must necessarily refer to a decision or order which disposes of the
right of the party in that particular matter already heard before the
director/deputy director. This is for simple reason that an appeal is a re-hearing.
What re-hearing will there be when there was nothing heard but only the fixing
of a date for the hearing? This appeal is vividly premature and not maintainable

on this ground too.

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CONCLUSION

[14] For the foregoing reasons, I find no merit in this appeal and I therefore dismiss it with costs of RM6,000.

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Appeal dismissed with costs of RM6,000.

Reported by Kanesh Sundrum

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